UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NATHAN LORING, Petitioner, v. ALICE PAYNE, Respondent.	Case No. C05-1599-RAJ-JPD REPORT AND RECOMMENDATION

I. INTRODUCTION AND SUMMARY CONCLUSION

Petitioner Nathan Loring, an inmate at the McNeil Island Corrections Center in Steilacoom, Washington, proceeds *pro se* and *in forma pauperis* in this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Dkt. No. 4. Respondent has filed an answer opposing the petition, Dkt. No. 8, to which petitioner has replied. Dkt. No. 12. Proceedings in this case were stayed and the petition was held in abeyance for well over a year, so that petitioner could make every effort to properly exhaust his claims in state court. *See* Dkt. Nos. 17, 20, 24, 25, 27. After careful consideration of the petition, briefs, the governing law and balance of the record, the Court recommends that petitioner's § 2254 petition be DENIED and this case DISMISSED with prejudice.

II. FACTS AND PROCEDURAL HISTORY

During the spring and summer of 1996, petitioner lived with his brother's family and their three year-old daughter, "A.J." Dkt. No. 11, Ex. 2 at 2.[1] Several years later, when she was eight, A.J. told her mother that petitioner had sexually abused her when he had lived with them in 1996. *Id*. Over the course of the next several weeks, A.J revealed details of her experience to a nurse at Harborview Medical Center and to Ashley Wilske, a child interviewer with the King County Prosecutor's Office. *Id*. During an interview with Wilske, A.J.'s minor sister, "N.L.," informed investigators that petitioner had sexually abused her since she was seven. *Id*. at 3.

Petitioner was charged with one count of first degree child rape and one count of third degree child rape. *Id*. Prior to trial, the trial court conducted a competency hearing to determine whether A.J. was competent to testify and whether her out-of-court statements to her mother, Harborview medical personnel, and Ms. Wilske could be admitted into evidence. *Id*. Following testimony by A.J., her mother, Ms. Wilske, and an expert in child memory and psychology, the trial court determined that A.J. was competent to testify and admitted her out-of-court statements. *Id*. at 2-5. On February 11, 2003, petitioner was found guilty by a jury and convicted of first degree child rape and one count of third degree child rape. Dkt. No. 11, Ex. 1. He was sentenced to 125 months imprisonment. *Id.*

A. Direct Review

Proceeding through counsel, petitioner appealed his conviction to Division One of the Washington Court of Appeals ("Court of Appeals"). Dkt. No. 11, Ex. 3.[2] After the State filed its responsive brief, petitioner filed a supplemental *pro se* brief that raised two additional assignments of error, Dkt. No. 11, Exs. 4-5, and shortly thereafter, petitioner's

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[1] For a more detailed description of the facts in this case, see *State v. Loring*, 122 Wash.App. 1039, 2004 WL 1658636, *1-2 (2004) (unpublished opinion).

[2] For a more detailed recitation of the procedural history in this case, see Dkt. No. 13.

attorney filed a reply brief that raised a new issue. *Id.* Ex. 6. Relying upon *Crawford v. Washington*, 541 U.S. 36 (2004), counsel argued that the trial court had erroneously admitted A.J.'s out-of-court statements without allowing petitioner an opportunity for cross-examination. *Id.* Ex. 6 at 1-5. The State moved to strike the *Crawford* argument, because it had been raised for the first time in the reply brief. *Id.* Ex. 7. Petitioner's counsel opposed the motion, but the Court of Appeals granted the motion to strike and affirmed petitioner's conviction in an unpublished decision. *Id.* Exs. 2, 8, 9; *State v. Loring*, 122 Wash.App. 1039, 2004 WL 1658636, *7 (2004) (unpublished opinion), *review denied*, 153 Wash.2d 1028, 110 P.3d 213 (2005) (unpublished opinion). Petitioner subsequently filed a petition for direct review in the Washington Supreme Court ("Supreme Court"), which the Supreme Court denied without substantive comment on March 29, 2005. *Loring*, 153 Wash.2d 1028, 110 P.3d 213. On May 6, 2005, the Court of Appeals issued its mandate. Dkt. No. 11, Ex. 12.

B. Collateral Review

Initially, petitioner did not file a collateral attack on his sentence. Instead, he filed a 28 U.S.C § 2254 petition for writ of habeas corpus in this Court. Dkt. No. 4. On March 24, 2006, the Court determined that petitioner had presented a mixed petition and ordered that he select the method of proceeding in this case. *See* Dkt. No. 13 (finding first and fourth claims for relief unexhausted). Upon the election of the petitioner, and good cause having been shown, the Court directed that petitioner's case be stayed and his § 2254 petition held in abeyance, enabling petitioner to make every effort to properly exhaust his claims in state court. Dkt. No. 17. After issuing multiple orders continuing the stay in this case, Dkt. Nos. 18, 20, 24, the Court was notified that petitioner had made every effort to exhaust his claims in state court. Dkt. No. 25. According, the stay was lifted and the parties were allowed to file supplemental briefs together with the additional state court record. Dkt. No. 27.

These pleadings indicate that on May 15, 2006, petitioner filed a personal restraint petition ("PRP") in the Washington Supreme Court, arguing that prosecutorial misconduct and

the trial court's competency determination regarding A.J. denied petitioner his right to a fair trial under the Sixth Amendment. Dkt. No. 30, Ex. 14. The Supreme Court transferred petitioner's PRP to the Court of Appeals, Dkt. No. 17, where it was eventually dismissed as procedurally barred. Dkt. No. 30, Ex. 18 (citing *In re Lord*, 123 Wash.2d 296, 303, 868 P.2d 835 (1994)). Petitioner then filed a motion for discretionary review in the Washington Supreme Court, raising the same claims. *Id.* Ex. 19. Review was denied by the Supreme Court Commissioner on October 17, 2006. *Id.* Ex. 6. The Supreme Court determined that petitioner failed to demonstrate that the interests of justice required re-examination of the issues he raised on direct review, and alternatively, that his PRP was time-barred under R.C.W. § 10.73.090(1). Petitioner's motion to modify the Commissioner's ruling was denied by the Supreme Court on January 3, 2007, and a Certificate of Finality was issued by the Court of Appeals three weeks later. Dkt. No. 30, Exs. 22, 23.

The parties then filed supplemental briefing relating to petitioner's habeas petition as newly exhausted. *See* Dkt. Nos. 28-33. Petitioner's § 2254 petition, the parties' numerous pleadings, and the complete record in this case are now before the Court.

III. CLAIMS FOR RELIEF

The petition, as supplemented, raises four claims for relief:

1. The trial court erred by finding the accuser was competent to testify, in violation of petitioner's Sixth Amendment right to a fair trial;

2. Petitioner's Sixth Amendment right to confrontation was violated when the trial court admitted the accuser's hearsay statements;

3. Petitioner's Sixth Amendment right to effective assistance of counsel was violated when defense counsel failed to object to certain prejudicial testimony; and

4. Prosecutorial misconduct denied petitioner of his Sixth Amendment right to a fair trial.

Dkt. No. 1 at 3, 6, 9, 11; Dkt. No. 31 at 2-9.

Respondent insists that the petitioner's first and fourth claims are procedurally barred, and argues that his second and third claims should be denied on the merits. Dkt. No. 8 at 17-24; Dkt. No. 28 at 7.

IV. DISCUSSION

A. Petitioner's First and Fourth Claims for Relief Are Procedurally Barred

A petitioner is deemed to have "procedurally defaulted" his claim for relief if he fails to comply with a state procedural rule, or fails to raise the claim at the state level. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Procedural defaults in state court may result in a procedural bar in federal habeas actions. The United States Supreme Court has recognized that when a petitioner has defaulted on his claims in state court, principles of federalism, comity, and the orderly administration of justice require that federal courts forgo the exercise of their habeas corpus power, unless the petitioner can demonstrate (1) cause for the default and prejudice attributable thereto, or (2) that failure to consider the claim will result in a "fundamental miscarriage of justice." *Harris v. Reed*, 489 U.S. 255, 261-62 (1989); *Coleman v. Thompson*, 501 U.S. 722, 729-32 (1991); *see also Franklin v. Johnson*, 290 F.3d 1223, 1230-31 (9th Cir. 2002).

The resulting bar can be express or implied. A state court invokes an express procedural bar by explicitly referring to a state rule or procedure to deny a petitioner's claim, or by referring to a case or phrase that invokes the applicable rule. *See, e.g., Zichko v. Idaho*, 247 F.3d 1015, 1021 (9th Cir. 2001) (rule); *Park v. California*, 202 F.3d 1146, 1149 (9th Cir. 2000) (case); *Bennett v. Mueller*, 322 F.3d 573, 580 (9th Cir.) (phrase), *cert. denied sub nom. Blanks v. Bennett*, 540 U.S. 938 (2003). An implied procedural bar exists when a petitioner has failed to present his claims fairly to the highest state court and would now be barred from returning to do so by an adequate, independent, and mandatory state procedural rule. *Moreno v. Gonzalez*, 116 F.3d 409, 411 (9th Cir. 1997).

In the present case, the Washington Supreme Court expressly found that R.C.W. § 10.73.090 barred petitioner's first and fourth claims collaterally attacking his 2003 conviction. *See* Dkt. No. 30, Ex. 20 at 2. This provision bars collateral challenges of convictions more than one year after such convictions become "final," which is triggered by the date of mandate for direct appeal. R.C.W. § 10.73.090(1), (3)(b). Here, that mandate was issued by the Court of Appeals on May 6, 2005. Dkt. No. 11, Ex. 12. Because petitioner did not file his PRP raising his first and fourth claims by this date, such claims are procedurally barred in this federal habeas action.[3] Resolution of this matter, then, turns on whether petitioner has shown that cause and prejudice exist, or a fundamental miscarriage of justice will result if these claims are not considered. *Harris*, 489 U.S. at 261-62. The Court finds that neither exception applies.

B. Petitioner Has Not Shown that Cause and Prejudice Exists, or that a Fundamental Miscarriage of Justice Will Result if His First and Fourth Claims Are Not Considered

Federal courts generally honor state procedural bars unless it would result in a "fundamental miscarriage of justice," or petitioner demonstrates cause and prejudice, absent waiver by the respondent. *Coleman*, 501 U.S. at 750. "Cause" is a legitimate excuse for the default, and "prejudice" is actual harm resulting from the alleged constitutional violation. *Id.*

To satisfy the "cause" prong of the cause and prejudice exception, a petitioner must show that "some objective factor external to the defense" prevented him from complying with the state's procedural rule. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). Objective factors establishing "cause" may include interference by government officials making compliance with the procedural rule impracticable, or "a showing that the factual or legal basis" for the claims "was not reasonably available" at the time of the default. *Id.* at 493-94 (internal quotations

[3] Furthermore, it is likely that petitioner could not return to state court to seek additional relief for any of his claims for any independent reason, as any further motion filed by petitioner in state court would likely be denied as repetitive, see R.C.W. § 10.73.040 and R.A.P. 16.4(d), making a return to state court futile. *Phillips v. Woodford*, 267 F.3d 966, 973-74 (9th Cir. 2001).

omitted). Constitutionally ineffective assistance of counsel may also constitute cause, but any attorney error short of that—such as attorney ignorance, inadvertence, or tactical decision—will not excuse the default. *Id.* at 494. Furthermore, the mere fact that a petitioner is *pro se* or lacks knowledge of the law is insufficient to satisfy the cause prong. *See, e.g.*, *Hughes v. Idaho State Bd. of Corr.*, 800 F.2d 905, 909 (9th Cir. 1986) (*pro se* petitioner must be held accountable for failure to timely and adequately pursue his remedy to the state supreme court).

Here, petitioner has failed to establish "cause" for his procedural default or even point to a single external impediment preventing him from timely presenting his first and fourth claims to the appellate courts of Washington. *See McCleskey*, 499 U.S. at 493. Indeed, the fact that petitioner was able to present and properly exhaust two independent, yet similar claims belies the existence of such an obstacle. Furthermore, the fact that one of petitioner's timely claims fall under the ineffective assistance of counsel category does not, without more, establish the requisite cause in this matter, for the substantive reasons stated below. *See infra* § IV.D.1. Petitioner has made no showing that some objective factor external to his defense prevented him from complying with R.C.W. § 10.73.090. Because petitioner "cannot establish any reason, external to him, to excuse his procedural default," this Court need not address the issue of actual prejudice. *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th Cir. 1998); *see Thomas v. Lewis*, 945 F.2d 1119, 1123 n.10 (9th Cir. 1991) (finding of lack of cause eliminates courts need to discuss whether petitioner was prejudiced by the alleged constitutional violation). Finally, because petitioner has not demonstrated the likelihood of his actual innocence, this case does not present the extraordinary instance where a habeas petition should be granted notwithstanding the absence of a showing of cause. *Murray*, 477 U.S. at 495-96.

C. Standard of Review

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996), governs habeas petitions filed by prisoners who were

convicted in state courts. 28 U.S.C. § 2254. AEDPA "demands that state-court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). A habeas petition may be granted with respect to any claim adjudicated on the merits in state court only if the state court's adjudication is "*contrary to*, or involved an *unreasonable application of*, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d) (emphasis added).

Under the "contrary to" clause of AEDPA, a federal habeas court may grant the writ only if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts. *See Williams v. Taylor*, 529 U.S. 362, 389-90 (2000). Under the "unreasonable application" clause, a federal habeas court may grant the writ only if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. *Id.* In addition, a habeas corpus petition may be granted if the state court decision was based on an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d).

In *Lockyer v. Andrade*, 538 U.S. 63 (2003), the Supreme Court examined the meaning of the phrase "unreasonable application of law," ultimately correcting an earlier interpretation by the Ninth Circuit which had equated the term with the phrase "clear error." The Court explained:

> These two standards . . . are not the same. *The gloss of clear error fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness. It is not enough that a federal habeas court, in its "independent review of the legal question" is left with a "firm conviction" that the state court was "erroneous."* . . . [A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must be objectively unreasonable.

Lockyer, 538 U.S. at 68-69 (citations omitted, emphasis added).

In sum, the Supreme Court has directed lower federal courts reviewing habeas petitions to be extremely deferential to state court decisions. A state court's decision may be overturned only if the application is "objectively unreasonable." *Id.* Whether a state court adjudication was reasonable depends upon the specificity of the rule: "the more general the rule, the more leeway courts have." *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004).

D. The State Court Decisions Rejecting Petitioner's Sixth Amendment Arguments and Upholding his Conviction Were Neither Contrary to Nor an Unreasonable Application of Clearly Established Supreme Court Law

1. *Sixth Amendment Right to Effective Assistance of Counsel*

Claims of ineffectiveness of appellate counsel are reviewed according to the standard announced in *Strickland v. Washington*, 466 U.S. 668, 687-90 (1984). In order to prevail on such a claim, the petitioner must establish two elements. First, he must establish that counsel's performance was deficient, *i.e.*, that it fell below an "objective standard of reasonableness" under "prevailing professional norms." *Strickland*, 466 U.S. at 687-88. Second, the petitioner must establish that he was prejudiced by counsel's deficient performance, *i.e.*, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Considering the first prong of the *Strickland* test, the petitioner must rebut the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The test is not whether another lawyer, with the benefit of hindsight, would have acted differently, but rather, whether "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* at 687, 689; *see also Dows v. Wood*, 211 F.3d 480, 487 (9th Cir. 2000) ("Under *Strickland*, counsel's representation must be only objectively reasonable, not flawless or to the highest degree of skill.").

To meet the second *Strickland* requirement of prejudice, the petitioner must show that counsel's deficient performance prejudiced the defense. *Id.* at 687. It is not enough that

counsel's errors had "some conceivable effect on the outcome." *Id.* at 693. Rather, the petitioner must establish a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 691. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the case. *Id.* at 694. Failure to satisfy either prong of the *Strickland* test obviates the need to consider the other. *Rios v. Rocha*, 299 F.3d 796, 805 (9th Cir. 2002).

Here, petitioner claims that his counsel rendered ineffective assistance when he failed to object to (1) testimony by A.J.'s father that A.J. exhibited behavior typical of a girl who had been molested; (2) testimony by N.L. that she "knew [A.J.] was not lying"; (3) and testimony by N.L.'s friend, James Glaefke, that he never doubted N.L. and told her parents that they, too, should believe N.L. because she "has no reason to make it up." Dkt. No. 10 at 14-16 (petition for review); Dkt. No. 31 at 5 (citing Dkt. No. 13, Ex. 6 at 236-37, 286, 320, 322). The Court of Appeals rejected these arguments, concluding that counsel's decision not to object was, in each instance, a tactical decision it was unwilling to second guess. *See Loring*, 122 Wash.App. 1039, 2004 WL 1658636 at *5-6.

a. *Testimony of A.J.'s Father*

At trial, A.J.'s father, Michael Johnson, testified regarding his concern over his daughter's behavior:

> . . . . [B]ecause of the background in the family, I had seen molestation and what it had done to the children, and girls, and [A.J.] was very—very—she reached out to boys, and always hung all over them, and it really bothered me, because that was a sign to me of molestation, because I had seen many girls that have been molested in the past, had done the same thing; they would hang onto boys and be real clingy. And that's what I was perceiving her doing, and it kind of bothered me. It made me feel like there wasn't something right there.
>
> Because I have an eight-year-old stepdaughter; she doesn't do it. I have a 10-year-old, my brother-in-law's daughter; she doesn't do it. All the girls that I've been around, they weren't acting like this, all these little kids. But my daughter was doing this, and acting more sexual, I would say, more adult-like with boys than what she should be. And it was generally older boys that she was doing this with, and that bothered me a lot.

Dkt. No. 11, Ex. 6 at 236-37.

The Court of Appeals determined that counsel's decision not to object to this testimony was strategic in nature. *Loring*, 122 Wash.App. 1039, 2004 WL 1658636 at *5. The court noted that rather than object, petitioner's counsel attacked Mr. Johnson on this very issue during cross-examination, exposing his credibility. *Id.* Indeed, counsel's cross-examination opened with the following exchange:

> Q: Good afternoon, Mr. Johnson. You said that you were concerned about molestation with [A.J.]—
>
> A: Mm-hm (affirmative).
>
> Q: —well before this ever came out?
>
> A: Yes.
>
> Q: But you never talked to her about that?
>
> A: No.
>
> Q: Never inquired with her about it?
>
> A: No.
>
> Q: Never talked to anyone else about it?
>
> A: Nope.
>
> Q: Never did anything about it?
>
> A: I just talked to my wife about it. That's about it.
>
> Q: Okay. And?
>
> A: And it was not molestation, it was my worry. It was just odd, the way she acted.

Dkt. No. 11, Ex. 6 at 240.

The Court of Appeals's conclusion in this regard was neither contrary to, nor an unreasonable application of, clearly established federal law as articulated by the United States Supreme Court. Petitioner's counsel undermined Mr. Johnson's testimony not by calling undue attention to it as it was made, but rather, by subsequently exposing the inconsistencies between his direct and cross-examination testimony (where he claimed, inconsistently,

that his worries both were and were not based on a fear of molestation), as well as between Mr. Johnson's stated "concerns" and his actions (or lack thereof). Petitioner's argument, at best, attacks a tactical decision by his trial counsel that is accorded great deference on habeas review and cannot, as a general matter, form the basis of an ineffective assistance of counsel claim. *Mancuso v. Olivarez*, 292 F.3d 939 (9th Cir. 2002); *see also Dows*, 211 F.3d at 487.

b. *Testimony of N.L. and James Glaefke*

At trial, N.L.'s testimony described, *inter alia*, how she learned about A.J.'s allegations of abuse, including the fact that petitioner "started spitting on [her] private," explaining that

> [a]fter a while, after we had been to the interview with [A.J.], and Detective Clark had told us exactly what [A.J.] said in the interview, I told Hallie [A.J.'s mother] later in the week, I think that I knew [A.J.] wasn't lying, because that's what he did to me.
>
> Q: At that time, when Hallie called you, you didn't tell her then about the spitting?
>
> A: I don't know. I don't think I went into detail.

Dkt. No. 11, Ex. 6 at 286.

The Court of Appeals viewed counsel's lack of objection here as tactical. *Loring*, 122 Wash.App. 1039, 2004 WL 1658636 at *6 ("Had Loring's attorney objected to the unsolicited remark, he surely would have drawn undue attention to the comment. In the context of N.L.'s testimony, failing to object can be characterized as strategic."). Rather than highlight the statements made by N.L., petitioner's counsel decided to attack her credibility. On cross-examination, petitioner's counsel was able to get N.L. to acknowledge that she had not mentioned the "spitting" incident to a single person until her interview with the prosecutor shortly before trial. *See* Dkt. No. 11, Ex. 6 at 307.

Petitioner also alleges that his trial counsel rendered ineffective assistance by not objecting to similar vouching testimony by Mr. Glaefke, a family friend. Dkt. No. 31 at 5-6. While testifying about a time when N.L. had told him that petitioner had sexually abused her "since she was eight," Dkt. No. 11, Ex. 6 at 317-19, Mr. Glaefke testified that he witnessed

N.L. instant messaging the petitioner in a visibly upset emotional state, after which the following exchange took place:

> [W]hen she closed [the computer] down . . . [N.L.] said "Now do you believe me?" "Yes." I told her I didn't doubt her before, but that's something you don't want to believe anyway, but I had no reason not to believe her.

Id. Ex. 6 at 320.

"Review[ing] [the] remarks against the backdrop of the defense's theory that in this dysfunctional family, no one should be believed," the Court of Appeals concluded that petitioner's counsel's decision not object to Mr. Glaefke's testimony was "a legitimate trial tactic." *Loring*, 122 Wash.App. 1039, 2004 WL 1658636 at *6; *see also* Dkt. No. 11, Ex. 6 at 325-27) (cross-examining Mr. Glaefke on the topic). The court also noted that petitioner's attorney "did an able job of representing [the petitioner] at trial." *Loring*, 122 Wash.App. 1039, 2004 WL 1658636 at *6. Because the court concluded that counsel's performance was not deficient, it did not proceed to the question of prejudice. *Id.*

For many of the same reasons stated above, the Court of Appeals's conclusion regarding the testimony of N.L. and Mr. Glaefke was neither contrary to, nor an unreasonable application of, clearly established Supreme Court law. As explained above, this Court must give defense counsel wide latitude in making tactical decisions, such as when and how and how often to object. *Dows*, 211 F.3d at 487. This is especially true where, as here, petitioner's counsel thoroughly attacked the statements in question during cross-examination. In sum, it simply cannot be said that counsel "failed to exercise the skill, judgment, or diligence of a reasonably competent attorney." *Jones v. Wood*, 114 F.3d 1002, 1010 (9th Cir. 1997).

Furthermore, assuming the opposite were true, a claim of ineffectiveness based upon counsel's failure to object must demonstrate that the objections probably would have produced a different result at trial. *See Strickland*, 466 U.S. at 690. Petitioner has failed to meet this burden. Given the overwhelming weight of the evidence against petitioner, it is highly probable that the jury would have returned an identical verdict absent these witnesses' non-

responsive statements, which in no way constituted the core of the State's case. *See id.* at 694. Petitioner's prejudice claim fails because he cannot establish a reasonable probability that, but for his trial counsel's alleged unprofessional errors, the result of his trial would have been different. *Strickland*, 466 U.S. at 694; *Rios*, 299 F.3d at 805.

In conclusion, petitioner's counsel's alleged missteps do not amount to errors of constitutional magnitude. Assuming *arguendo* that the opposite were true, the Court would find that counsel's deficient performance did not prejudice petitioner's defense under the circumstances. *Strickland*, 466 U.S. at 691, 694.

2. *Sixth Amendment Confrontation Clause*

The admissibility of evidence is generally a question of state law. However, the Sixth Amendment's Confrontation Clause confers rights that cannot be satisfied merely by meeting the requirements of the rules of evidence. The Confrontation Clause provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. CONST. amend. VI. The right of cross-examination is secured by this clause. *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination." *Id.* at 54 (*quoted in Davis v. Washington*, 547 U.S. 813, 821 (2006)).

Petitioner's Sixth Amendment Confrontation Clause argument is very similar, if not identical, to that made by the petitioner's appellate counsel on direct review. *See* Dkt. No. 11, Exs. 6, 10. Specifically, petitioner contends that because A.J. should have been deemed incompetent and thus "unavailable" to testify, and because she was never subject to cross-examination, her out-of-court statements to her mother, medical personnel, and the child investigator should have been excluded as violative of petitioner's Sixth Amendment confrontation rights under *Crawford*.

These arguments must fail. First, the Washington Court of Appeals concluded that A.J. *was* competent, and thus available, to testify at trial. *See Loring*, 122 Wash.App. 1039, 2004 WL 1658636 at *3. Regardless of the fact that petitioner is procedurally barred from re-asserting this argument, *see supra* § IV.A., the Court determines that the Court of Appeal's decision denying petitioner's competency claim was neither contrary to, nor an unreasonable application of clearly established federal law as announced by the United States Supreme Court. *Williams*, 529 U.S. at 389-90.

Second, A.J. *was* subject to cross-examination at trial. Dkt. No. 13, Ex. 6 at 177-224. The Confrontation Clause "is not violated where the declarant is in court and defendant can cross-examine [her]." *Padilla v. Terhune*, 309 F.3d 614, 621 (9th Cir. 2002) (citing *United States v. Valdez-Soto*, 31 F.3d 1467, 1470 (9th Cir. 1994) ("We are aware of no Supreme Court case, or any other case, which holds that introduction of hearsay evidence can violate the Confrontation Clause where the putative declarant is in court, and the defendants are able to cross-examine him."); *see also United States v. Owens*, 484 U.S. 554, 559 (1988) ("[T]he Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'") (quoting *Kentucky v. Stincer*, 482 U.S. 730, 739 (1987)). *Crawford* is distinguishable from the instant case because in *Crawford* the declarant was unavailable to testify and her previous statements could therefore not be cross-examined. Such was not the case here. Accordingly, petitioner's Confrontation Clause argument must fail. *See, e.g.*, *Owens*, 484 U.S. at 559 (1988); *California v. Green*, 399 U.S. 149, 161 (1970).

D. An Evidentiary Hearing Is Not Required

Generally, an evidentiary hearing is appropriate in a habeas corpus proceeding when the petitioner's allegations, if proven, would entitle him to relief. *Totten v. Merkle*, 137 F.3d 1172, 1176 (9th Cir. 1998). Such a hearing is not required, however, when the Court is able to resolve the petition on the existing state court record. *Id*. In this case, the record is sufficient

for the Court to resolve the petition without a hearing. Accordingly, an evidentiary hearing is not required.

V. CONCLUSION

For the foregoing reasons, the Court recommends that petitioner's § 2254 habeas corpus petition be DENIED and this case DISMISSED with prejudice. Consequently, the Court DENIES petitioner's motion for court-appointed counsel (Dkt. No. 33) filed on January 11, 2008. A proposed order accompanies this Report and Recommendation.

DATED this 17th day of March, 2008.

JAMES P. DONOHUE
United States Magistrate Judge